IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.22/2001

STATE
through Public Prosecutor,
High Court of Bombay at Panaji,
Panaji, Goa. .... Appellant.

V/s.

1. Paulo Colaco,
major, son of Francisco Colaco,
r/o. House No.17,
Deulamol, Molcornem,
Quepem, Goa.

2. Piedade Colaco,
son of Francisco Colaco,
major, r/o. House No.17,
Deulamol, Molcornem,
Quepem, Goa.

3. Josinho D'Costa,
son of Lawrence D'Costa,
major, residing at House,
No.13, Kotamol, Molcornem,
Quepem, Goa. .... Respondents.

Mr. A.P. Lawande, Public Prosecutor for the State/ appellant.

Mr. N.N. Sardessai, Advocate for respondent No.1 & 2.

Mrs. A.A. Agni, Advocate for respondent no.3.

CORAM : P.V. KAKADE &
P.V. HARDAS, JJ.

DATE : OCTOBER 22, 2002.

ORAL JUDGMENT : (Per KAKADE, J.)

The State has preferred this appeal against the

order of acquittal recorded by the learned Addl. Sessions Judge, South Goa, Margao, in Sessions Case No.21/98, wherein all the respondents/accused persons came to be acquitted of the offences punishable under Sections 449, 342, 302 read with Section 34 of the Indian Penal Code.

2. The case of the prosecution, in a nutshell, is thus :

The deceased Francis Gracias was a bachelor, residing alone in a hut situated at Deulamol, Molcornem. Francis was working with Josinho D'Costa, accused No.3 and he had done some work for accused No.3, due to which accused No.3 was owing an amount of Rs.6500/- to Francis. But it was not paid to him, instead accused No.3 refused to pay anything to him. Thereafter, the scooter of accused No.3 was found missing and Francis Gracias told accused No.3 that it was lying in the sugar-cane plantation. Accused No.3 lodged a complaint against Francis Gracias, who was arrested and the scooter was attached at the instance of Francis. This happened somewhere in the month of November, 1997. From that time onwards, there was enmity between Francis Gracias and accused No.3.

3. One Munno Gaonkar, a friend of the deceased Francis had sold two wooden beams on 29.3.98 to Milagres Colaco, the brother of accused Nos. 1 and 2 for the price of Rs.600/-. The said Milagres, however, paid only Rs.300/-. Deceased Francis Gracias was in need of money and hence, he requested Munno Gaonkar to him and Munno gave the said amount of Rs.300/- to Francis Gracias. Munno met Milagres and asked him about balance money of the beams, but Milagres told him that whatever he had paid was the total price of the beams. Munno told this to deceased Francis, who suggested Munno to look for other customer, as he was in need of money. One Vasudev Gawas wanted wooden beams. Munno called said Vasudev Gawas on 8.5.98 saying that Francis Gracias was having wooden beams for sale. On 7.5.98 Francis Gracias, Munno and one Suresh Naik went to the rivulet, wherein Milagres Colaco had dumped the two wooden beams and they all brought those beams and kept them near the hut of Francis. On 8.5.98, Vasudev Gawas came with truck and labourers and took away those beams and price was fixed at Rs.600/- to be paid by said Vassudev.

4. On 12.5.98, at about 9 p.m. at Three Roads Junction of Deulamol, Molcornem, near the tea shop of Tulshidas Malkarnekar, all the three accused persons entered into hot arguments with deceased Francis over

the said two wooden beams and the accused persons insisted that it was Francis along with Suresh and Munno who had committed theft of the said beams. They also threatened Francis that they would kill him in case he did not return the beams which he had taken away. On the next day, i.e. on 13.5.98 at about 1.30 hours in the morning, Pw.2, Maurice Gracias, brother of deceased Francis heard loud noise and as he remembered the earlier incident, he took his torch and went towards the direction of the hut of his brother, Francis and on reaching near the hut, he saw three persons and therefore, flashed his torch light on them and identified them to be accused Nos.1, 2 and 3 who were about 3 metres away from him and were running away. On entering the hut of Francis, Maurice Pw.2 saw that Francis was set ablaze and his legs were tied with aluminium wire. Maurice Pw.2, fetched a pot and a bucket filled with water, from the same hut and poured the water on his brother, Francis and extinguished the fire. Thereafter, he untied the aluminium wire and he shouted for help. The hut was smelling of kerosene. One Thomas Fernandes, Pw.9 came at the scene, saw Francis and went away. Pw.2, Maurice then went to Nagvem Molcornem to the house of his uncle and informed him about the incident. Pw.7, Menino Gracias came to the hut and saw Francis and thereafter, Maurice as well

as Menino contacted local Sarpanch, Sudhaker Pawaskar, Pw.5, who on telephone informed the constable on duty at Quepem Police Station regarding the incident. Pw.25, Vishnu Naik, Head Constable took the call and made Station Diary entry and when Maurice Pw.2 went to the police station, he was taken to the P.S.I. Pw.26, Bhanudas Dessai, who recorded the complaint of Maurice, Pw.2 vide Exhibit Pw.2/A.

5. The offence was registered between 6.05 to 7.15 a.m. on 13.5.1998. Pw.26, Bhanudas Dessai conducted the panchanama of the scene of offence and, thereafter, conducted inquest panchanama. Completely burnt body of the deceased Freancis was found. There was smell of kerosene and burnt clothes in the hut were also found. Three pieces of aluminium wire, burnt bed sheet pieces, and other incriminating articles were seized under the panchanama. The dead body was sent for post mortem examination. Pw.1, Dr. Avinash Poojari performed the autopsy on the dead body of Francis on 13.5.98 between 12.30 p.m. to 3.30 p.m. and issued the post-mortem report. The body was found with 100 % burns due to which death was caused.

Accused No.1 was arrested on 13.5.98. Under a panchanama, clothes were attached. Accused No.2 was

arrested on 14.5.98 and accused No.3 was arrested on 18.5.98 under panchanamas respectively. Thereafter, on 25.6.98, the investigation was handed over to CID, Crime Branch, Panaji, who recorded some supplementary statements and some new statements. All the articles seized in connection with the offences were sent to Central Forensic Science Laboratory, Hyderabad for scientific examination. After completing the remaining formalities, Charge-sheet came to be filed against all the accused persons for commission of the offences punishable under Section 449, 342 and 302, read with 34 of the Indian Penal Code.

The case was committed to the Court of Sessions, South Goa, at Margao. The learned Addl. Sessions Judge, framed charges against all the accused persons in respect of the impugned offences, to which, they pleaded not guilty. The defence of the accused was that of total denial of any liability. According to them, they were arrested without any reason. Accused No.3 has taken a stance submitting that he surrendered to the police when he read the names of accused Nos.1 and 2 along with his name in the newspaper.

The prosecution proceeded with the case and led evidence of, in all, 27 witnesses. On the basis of the

evidence on record, the learned trial Judge, came to the conclusion that the prosecution had established that the deceased, Francis Gracias suffered homicidal death. However, it was held that the prosecution had totally failed to prove any of the offences against the accused persons and, therefore, for want of adequate evidence, they came to be acquitted by order dated 28.9.2000. Hence, the appeal.

6. We have heard Mr. Lawande, the learned Public Prosecutor, as well as Mr. N.N. Sardessai, learned Counsel for respondents No.1 and 2 and Mrs. A.A. Agni, learned Counsel for respondent No.3,exhaustively, who took us through the entire evidence on record, as well as the Judgment of the lower Court.

7. At the outset, it may be noted that taking into account the facts and circumstances involved in the case, it is quite apparent that the entire prosecution case is based on the circumstantial evidence and the fate of the prosecution case revolves around the sole testimony of Pw.2, Maurice Gracias. No doubt, as can be seen from the Judgment of the lower Court, that the prosecution relied upon as many as 10 material circumstantial pieces of evidence to bring home the

guilt, however, as fairly submitted by Mr. Lawande, the learned Public Prosecutor that the moot factor around which the entire case revolves, is the testimony of Pw.2, Maurice Gracias, when he states that he saw all the three accused persons coming out of the hut and running away towards cashew plantation, which fact was allegedly reported by Pw.2, Maurice to the Sarpanch of Village as well as the witnesses. Therefore, in order to appreciate the evidence of the prosecution, in its proper perspective, it would be necessary to look into the testimony of Pw.2, Maurice Gracias.

Pw.2, Maurice Gracias has stated that at about 1.30 a.m. after hearing the noise at the hut of Francis, he took a torch and went there and when he was at a distance of about 7 to 8 metres from the hut, he put on the torch and saw accused No.3 coming out of the hut, followed by accused Nos.1 and 2. He has further stated that the accused persons ran towards upper side. He recognized them in the light of the torch. Thereafter, he entered the hut and saw his brother, Francis was burning and his knees were tied with wires. This statement is the foundation of the entire prosecution case and, therefore, it would be necessary for us to determine the credibility of the statement with touchstone of the surrounding circumstantial

evidence on record.

In his complaint at Exhibit Pw.2/A, Maurice Gracias has stated that he saw accused persons near the hut of his brother and, he saw them from a distance of about 3 metres and flashed his torch on them and clearly identified them as accused Nos.1, 2 and 3 who ran away. Therefore, it is clear that in the FIR which was recorded immediately after the incident what witness Pw.2 Maurice has stated is that he saw accused persons near the hut; whereas in his his testimony, he has made improvements stating that he saw accused Nos.1, 2 and 3 coming out of the hut and then running away. This contradiction, as can be seen from the record, is duly proved. It is not in dispute that no one around has seen the accused persons either coming out of the hut or near the hut of the deceased, Francis either before or after the incident and, therefore, it is needless to mention that the statement made by Maurice Pw.2 in his testimony is totally uncorroborated one. In our view, seeing someone out side the hut and seeing a person coming out of the hut, are two different facts and acts and one cannot make any mistake on this particular aspect. In view of this, the uncorroborated testimony of Maurice, so far as his statement is concerned, is rendered doubtful. This doubt gains further credibility

because the version of Pw.2 that he had seen the accused persons exchanging words with his deceased brother and allegedly threatening to kill him earlier, at about 9 p.m. on 12.5.98, has also not been corroborated and, therefore, possibility cannot be ruled out that Maurice jumped to the conclusion that the accused were the killers of his brother due to the said previous incident when he saw them near the hut of the deceased, Francis.

8. The doubt, in this regard, is further aggravated by the conduct of Pw.2, Maurice immediately after the incident. It is in the evidence that one Thomas Fernandes who was residing in the vicinity came to the spot when Maurice raised alarm to help and saw the deceased, Fracnis and he went away. Therefore, the said Thomas was the first person to go to the hut after Pw.2. But the evidence in this regard is silent. Further, Pw.2, Maurice had informed the said Thomas of the involvement of the accused persons in the incident. The rule of natural conduct, in all probabilities, would demand that the names of the culprits should have been immediately revealed to the persons like Thomas, who had come at the scene immediately after the occurrence of the incident. But Maurice himself does not say in his examination in chief that he told Thomas anything. However, in his cross examination, Maurice categorically

stated that he had told Thomas that some thieves had set his brother on fire and ran away towards upper side. If it was the answer given in the cross examination by Maurice, then his own statement in the examination in chief that he saw the accused persons coming out of the hut of the deceased, Francis becomes all the more doubtful and unreliable. The evidence of Pw.9, Thomas is of no help to the prosecution who has categorically stated that when he came to the hut, he went away seeing the deceased, Francis and returned to the scene of offence when he was merely told by Maurice that the persons who had set Francis on fire had ran away.

9. In fact, the several witnesses have come forward on behalf of the prosecution stating that Pw.2, Maurice told them that he saw the accused persons coming out of the hut of the deceased at the time of the incident and narrated the said fact to them. However, it is pertinent to note that Pw.2 Maurice himself does not say anything that he narrated the names of the accused persons in his versions to the said witnesses. For instance, Pw.2, Maurice neither in his complaint nor in his deposition says that he told his father, Costao Gracias, who also had come to the scene of offence about seeing accused coming out of the hut. Similarly, Pw.14, Monica Gracias, wife of Maurice Gracias, Pw.2, has

stated that her husband told her that he had seen all the accused persons in the light of the torch, running from the hut of Francis towards the cashew plantation. However, Pw.2, Maurice himself stated that he had told his wife that somebody had burnt Francis without naming the accused persons. Therefore, the testimony of Pw.14, Monica, like several other witnesses, is rendered useless, as hearsay evidence, which cannot be made admissible in law.

10. As noted earlier, the prosecution has sought to rely upon various pieces of circumstantial evidence such as relationship between the deceased and the accused was strained on account of non-payment of money and the evidence regarding the fact that the deceased was assaulted by the accused persons during the quarrel and he was threatened to be killed. However, the basic and the important link of the circumstantial evidence is that of testimony of Pw.2, Maurice who is said to have seen the accused persons coming out of the hut of Francis, who was found to have set on fire after the accused persons left the place at the time when Maurice entered the hut. In this regard, it may be noted that while adjudicating the case solely based on the circumstantial evidence, the following principles are to be taken into account :

(1) the circumstances alleged must be established by satisfactory evidence, as in the case of other evidence;

(2) the circumstances proved must be of a conclusive nature and tendency so as to be totally inconsistent with his innocence and are not explanable on any other hypothesis except the guilt of the accused;

(3) although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced; some of these links may have to be inferred from the proved facts;

(4) in drawing those inferences or presumptions, the Court must have regard to the common course of natural events, to human conduct and their relation to the facts of the particular case;

(5) where circumstances are susceptible of two equally possible inference, the Courts should accept that inference which favours

the accused rather than an inference which goes in favour of the presumption.

Therefore, if we apply these tests to the evidence at hand in the present case, it is obvious that the relevant circumstance of the testimonial statement of Pw.2, Maurice is not at all reliable and thus, it cannot be held that the prosecution has proved that accused Nos.1,2 and 3 were seen by Maurice coming out of the hut of deceased Francis and were identified by Maurice and they ran away. In other words, mere finding of accused Nos.1, 2 and 3 in the vicinity of the hut of the deceased Francis would, in our considered view, not be sufficient to link them to the incident in which Francis died. No doubt that it is established that Francis suffered homicidal death, and that it is also reasonably established that the relationship between the accused and the deceased was strained due to earlier incident of quarrel over money transaction, still it is necessary that all the incriminating facts and circumstances should be fully established by cogent and reliable evidence and the facts so established must be consistent with the guilt of the accused and should not be capable of being explained away on any other reasonable hypothesis than that of the guilt of the accused. In short, the

circumstantial evidence should unmistakably point to one and one conclusion only that the accused person and none perpetrated the alleged crime. If the circumstances proved in a particular case are not inconsistent with the innocence of the accused and if they are susceptible of any rational explanation, no conviction can lie. In the present case before us, the all important link in the circumstantial evidence, i.e. the relevant testimonial statement of Pw.2, Maurice is found to be not only weak, but totally unreliable and, as such, it cannot be said that the chain of circumstances is so complete against the accused/respondents, so as to be sufficient to bring home the guilt.

In view of this position, we are inclined to concur with the reasoning adopted and the findings recorded by the learned Addl. Sessions Judge, South Goa, Margao and hold that no interference by this Court, is required in this case and, as such, the appeal deserves to be dismissed and stands dismissed. The Judgment and Order passed by the learned Addl. Sessions Judge, Margao in Sessions Case No.21/1998 is, hereby, confirmed.

P.V. KAKADE, J.

P.V. HARDAS, J.